Supreme Court of the United States.

No. 31.—October Term, 1903.

Marc Hubbert, Petitioner,
vs.
The Campbellsville Lumber Company.

On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[November 9, 1903.]

On March 18, 1878, the general assembly of Kentucky passed an act authorizing the county of Taylor to compromise its debts and issue new bonds of the county not exceeding in amount $125,000, and also authorizing the Circuit Court, in case of a judgment on any of such bonds and a refusal by the county within thirty days to levy a tax sufficient to pay it, to make an order based on the last previous assessment levying a tax and appointing a collector. On February 27, 1882, an amendatory act was passed increasing the issuable amount to $150,000, providing that any judgment rendered thereon should constitute a lien on all the real and personal property in the county subject to taxation, and also that, if the court rendering the judgment should be of opinion that such serious obstruction was likely to be offered as would materially delay the enforcement of the judgment, it should refer the matter to a commissioner with instructions to ascertain and report the amount proportionally necessary for the holders or owners of any such property to pay in order to raise promptly a sum sufficient to pay the judgment. Personal judgments were authorized against the parties found to be the owners of property within the limits of the county, to be enforced by executions as other personal judgments. Section 10 reads as follows:

"Sec. 10. The bonds to be issued under the act to which this is an amendment shall, on their face, stipulate that the holders of any of them, or any coupon thereof, shall be entitled to the remedies for the collection of the same herein, and in the act to which this is an amendment, provided for."

Bonds were issued by the county, some of which passed into the possession of the plaintiff, who brought suit and obtained judgment against the county in the Circuit Court of the United States for the District of Kentucky.

The bonds did not contain the stipulation referred to in section 10, but did contain the following recital:

"This is one of an issue amounting in all to $125,000, authorized by an act of the general assembly of the Commonwealth of Kentucky, approved March 18, 1878."

Each bond also bore the following endorsement:

"Issued by authority of an act of the general assembly of the State of Kentucky, approved March 18, 1878."

On application for further relief the Circuit Court awarded to the plaintiff the benefit of the special provisions of the amendatory act of 1882, but the Circuit Court of Appeals held that he was not entitled to them. (50 C. C. A. 435; 112 Fed. Rep. 718.) Thereupon the case was brought here on certiorari. (186 U. S. 485.)

Mr. Justice BREWER delivered the opinion of the Court.

Conceding, without deciding, that both acts of the general assembly of Kentucky were in all respects constitutional and valid, and that the proceedings of the Circuit Court were in strict compliance therewith, we notice only the single question of the effect of the omission from the bonds of the stipulation required by section 10, as well as of any reference to the amendatory act, and are of opinion that the omission is fatal to the special relief provided for in that act.

There is nothing in the nature of things nor in the terms of the two acts which prevents the parties, the county and the recipient of the bonds, from contracting for solely the remedies provided in the original act. The later act provided remedies not in lieu of but in addition to those given by the former. There is nothing on the face of the bonds to indicate that either of the parties had in contemplation the provisions of the amendatory act. On the contrary, the bonds in terms state that they are of an issue amounting to $125,000, authorized by the original act. As the amendatory act authorized the issue of $150,000, and as no reference is made to that act, the language of the bond plainly excludes it as the basis of authority, and therefore as plainly implies that the remedies by that act were not contracted for by the county.

We need not stop to inquire what would be the effect of a recital on the face of the bonds that they were issued under the authority of the amendatory act, or whether such recital would obviate the necessity of complying with the provisions of section 10, for there is no reference to such act, and the bonds on their face do not purport to be issued under its authority. So that the question is whether the plaintiff, in the absence of any such stipulation as is required by section 10, without any reference in the bonds to the amendatory act, and when they purport to be issued under the authority of the original act, can avail himself of the remedies not provided for by the original and only granted in the amendatory act.

Much is said in the opinion of the Court of Appeals as well as in the briefs of counsel as to the difference between a directory and a mandatory

provision, the plaintiff claiming that section 10 is simply directory, while the defendant insists that it is mandatory. In that opinion these authorities are cited:

"'By directory provisions,' says Judge Cooley, 'is meant that they are to be considered as giving directions which ought to be followed, but not as so limiting the power in respect to which the directions are given that it cannot effectually be exercised without observing them.' (Cooley's Constitutional Limitations, star page 74.)

"Lord Penzance, in *Howard* v. *Bodington*, (L. R. 2 P. Div. 211,) after commenting on the difficulty of gathering any rule from the cases, said: 'I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the act, and upon a review of the case in that aspect decide whether the matter is what is called imperative or directory.'"

Without attempting to state any general rule, if indeed one such exists, for distinguishing between a directory and a mandatory provision, it is sufficient to say that when a statute provides an extraordinary remedy to the holder of bonds containing an express stipulation that he "shall be entitled" to that remedy, it should not be adjudged that he is also entitled to it in the absence of such stipulation, for it is a reasonable presumption that if the county in issuing the bonds intended to contract for such extraordinary remedy it would have complied with the express provision of the statute and incorporated the stipulation into the bonds. That the authority in this amendatory act to proceed directly against the several owners of property in the county is not an ordinary remedy for the collection of bonds is true of the State of Kentucky and generally of the States of the Union. Indeed, the original act gave something more than the ordinary remedy, and when the amendatory act provides for what must be conceded is under the circumstances an extraordinary remedy it would seem reasonable to hold that all of the provisions of the statute which grant such remedy should be complied with before it can be considered as contracted for.

We are of opinion that the Court of Appeals did not err, and its judgment is

Affirmed.

Mr. Justice WHITE and Mr. Justice MCKENNA concur in the result.

Mr. Justice HARLAN, Mr. Justice BROWN and Mr. Justice PECKHAM dissent.